

UNITED STATES DEPARTMENT OF TRANSPORTATION
FEDERAL AVIATION ADMINISTRATION
WASHINGTON, DC

In the Matter of: TOKYO AIRCARGO USA

FAA Order No. 2002-26

Docket No. CP01EA0027

Served: November 22, 2002

DECISION AND ORDER¹

Respondent Tokyo Aircargo USA ("Tokyo") has filed an appeal from the written Order Assessing Civil Penalty issued by Administrative Law Judge Burton S. Kolko on October 23, 2001. In this order, the ALJ construed Tokyo's failure to respond to the complaint and to the motion for default judgment as both a constructive withdrawal of the request for hearing and as an admission of the complaint's allegations. As a result, the ALJ concluded that there was no need to hold a hearing. The ALJ vacated a previously-issued notice of hearing, assessed a \$4,400 civil penalty, and closed the case. Tokyo's attorney argues on appeal that neither his client nor he received a copy of the complaint until after the issuance of the Order Assessing Civil Penalty. Tokyo's appeal is granted, the ALJ's order is reversed, and this matter is dismissed.

On July 3, 2001, Complainant served the Final Notice of Proposed Civil Penalty (FNPCP) on Tokyo's president at 160-23 Rockaway Blvd., Jamaica, NY 11434. Shortly afterwards, Tokyo retained an attorney to represent it in this matter. By letters dated

¹ The Administrator's civil penalty decisions, as well as indexes of the decisions, the Rules of Practice in civil penalty actions, and other information, are available on the Internet at the following address: <http://www.faa.gov/agc/cpwebsite>. In addition, there are two reporters of the decisions: Hawkins' Civil Penalty Cases Digest Service and Clark Boardman Callaghan's Federal Aviation Decisions. Finally, the decisions are available through LEXIS and Westlaw. Additional information is available on the website.

July 20, 2001, Tokyo's attorney notified the agency attorney assigned to this matter and the Hearing Docket that his office represented Tokyo, and that Tokyo requested a formal hearing.²

Complainant filed the complaint on August 1, 2001, with the Hearing Docket, and sent a copy of the complaint to Tokyo at its Jamaica, NY, address via certified mail, return receipt requested. Complainant states that it did not get the "green card" confirmation that Tokyo received the complaint,³ and Tokyo claims that it did not receive the complaint. Due to an oversight, Complainant did not serve a copy of the complaint on Tokyo's attorney.

The ALJ served the Notice of Hearing on the parties on September 4, 2001.⁴ The ALJ sent the Notice of Hearing to Tokyo, but not to its attorney.⁵ That notice specifically advised Tokyo of the requirement that it file an answer.

Complainant filed its Motion for Default Judgment on September 11, 2001. In its motion, Complainant noted that:

- It had filed the complaint on August 1, 2001;
- Tokyo was required to file its answer within 35 days after service of the complaint;
- Forty days had passed since the complaint had been served, and yet Tokyo had not filed an answer.

² Tokyo's attorney attached the completed FAA request for hearing form, on which he included his name, address and telephone number.

³ Complainant submitted an affidavit signed by Lisa Hooks, a paralegal specialist in the FAA's Office of the Regional Counsel for the Eastern Region. She averred that she mailed the complaint to the Hearing Docket and Tokyo by certified mail on August 1, 2001, and that while her office received the return receipt for the envelope sent to the Hearing Docket, it did not receive the return receipt for the envelope sent to Tokyo.

⁴ The ALJ scheduled the hearing to be held on December 7, 2001.

⁵ At this point, the ALJ was unaware that Tokyo had retained counsel.

Complainant sent a copy of the Motion for Default Judgment by mail to both Tokyo and its attorney. Tokyo's attorney received the motion a few days later but did not file a reply.

On October 23, 2001, the ALJ issued an order assessing a \$4,400 civil penalty against Tokyo. The ALJ construed "Respondent's silence both as a constructive withdrawal of the request for a hearing and as an admission of the complaint's allegations." He determined that "[e]ither conclusion renders the holding of a hearing unnecessary." Order Assessing Civil Penalty (October 23, 2001). Tokyo filed a notice of appeal on October 29, 2001.

Two days after filing the notice of appeal, Tokyo's attorney called the FAA regional counsel's office and asked for a copy of the complaint. He received it on November 1, 2001.⁶

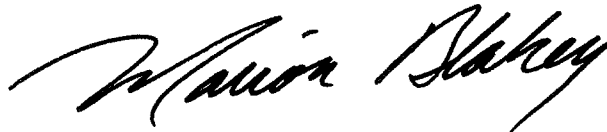
Tokyo's attorney argues on appeal that neither his client nor he received a copy of the complaint until November 1, 2001. (Declaration of Robert Snyder dated December 13, 2001.) He argues that if he had received the complaint in a timely fashion, he would have filed an answer. (*Id.*) He objects to the Order Assessing Civil Penalty, because, he argues, Complainant did not meet the Rules of Practice's requirement regarding service of the complaint. He asserts that he did not file a reply to the Motion for Default Judgment because he thought that it was premature, given that he had not received service of the complaint and had just received the Notice of Hearing.

Even though Tokyo did nothing to protect itself from the possibility of a default judgment after receiving the Motion for Default Judgment, the fact remains that

⁶ See Declaration of Robert W. Snyder, dated December 13, 2001 (attached to the Appeal Brief.)

Complainant was on notice, at least constructive notice, that there may have been a failure of service, and it too did nothing to protect its litigation position. Complainant knew or should have known that it did not receive the green card confirming that Tokyo received the complaint. While a general presumption exists that a properly addressed letter that was placed in the U.S. Mail has been delivered, there is no such presumption of delivery when the sender did not receive the return receipt for a piece of certified mail. Moya v. United States, 35 F.3d 501, 504 (10th Cir. 1994); Mulder v. Commissioner of Internal Revenue, 855 F.2d 208, 215 (5th Cir. 1988). As a result, on the record as it now exists, it cannot be determined with certainty that the complaint was served properly.

Accordingly, as there would be nothing to gain by remanding this matter for further proceedings, the ALJ's order assessing a civil penalty is reversed, and the complaint is dismissed.



MARION C. BLAKEY, ADMINISTRATOR
Federal Aviation Administration

Issued this 18th day of November, 2002.